MOTION FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 73-861

EAST CARROLL PARISH SCHOOL BOARD AND
EAST CARROLL PARISH POLICE JURY,

Petitioners,

v.

STEWART MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

ARMAND DERFNER
Epstein, McClain & Derfner
P.O. Box 608
Charleston, S.C. 29402

PAUL R. DIMOND
WILLIAM E. CALDWELL
520 Woodward Building
733 - 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Amicus Curiae.

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The Lawyers' Committee for Civil Rights Under Law moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the annexed brief *amicus curiae* in order to present to the Court a fundamental statutory issue which the courts below and the litigants have not treated as central but which the *amicus* believes is dispositive of this case without reaching the constitutional issues. This case has traveled here principally on the issue whether the at-large elections adopted in East Carroll Parish in 1968 and retained in 1971 dilute the votes of black citizens in

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a non-profit organization which was created in 1963 at the request of Presndent John F. Kennedy to involve private lawyers throughout the nation in the struggle to assure equal civil rights for all Americans. The Committee's membership includes several former Attorneys General and Assistant Attorneys General for Civil Rights,

violation of the fourteenth and fifteenth amendments to the Constitution, but the *amicus* believes it was error for the courts below even to consider this question in view of the fact that the apportionment plans adopted beginning in 1968 have never been cleared under section 5 of the Voting Rights Act. *Amicus* accordingly desires to file this brief in order to show that implementation of the plans at issue should be enjoined for failure to meet the requirements of the Voting Rights Act.

The respondents have consented to the filing of a brief by the *amicus curiae,* but the petitioners have not.

Wherefore the Lawyers' Committee for Civil Rights Under Law seeks leave to file the attached brief *amicus curiae.*

Respectfully submitted,

ARMAND DERFNER
Epstein, McClain & Derfner
P.O. Box 608
Charleston, S.C. 29402

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WILLIAM E. CALDWELL
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a dozen past Presidents of the American Bar Association, a number of law school deans, as well as many of the nation's leading attorneys. Through its national office, and its offices in Jackson, Mississippi, and a number of other cities, the Lawyers' Committee has actively engaged the services of over a thousand members of the private bar in addressing legal problems in such areas as voting, education, employment, housing, and the administration of justice.

One of the highest priorities of the Lawyers' Committee has always been the Voting Rights Act, and it has appeared before this Court in Voting Rights Act cases both as counsel for parties, *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Connor v. Waller*, 95 S.Ct. 2003 (1975), and as *amicus curiae*, *Georgia v. United States*, 411 U.S. 526 (1973). The Lawyers' Committee filed a brief *amicus curiae* in this case in support of respondent's petition for rehearing *en banc* in the court of appeals. We believe that this case presents issues which will have a profound effect on the administration of the Act, whose special remedies (including section 5) have now been extended for seven more years. P.L. 94-73.[1]

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[1] *Amicus curiae* believes that if the courts below are held to have acted properly in reaching the constitutional questions, the judgment should be affirmed because the court of appeals faithfully and correctly applied the pertinent standards of *White v. Regester*, 412 U.S. 755 (1973), in finding unconstitutional dilution.

The district court came to agree that the at-large plans were unconstitutional because they diluted black citizens' votes, and entered an order to that effect on March 27, 1972. While there may be a question as to the district court's jurisdiction, since the notice of appeal had been filed, the entry of the order is significant in evaluating the district court's "intensely local appraisal" of the plan, to which Petitioners' Brief frequently refers. E.g., Petitioners' Brief, p. 18.

ARGUMENT

The Voting Rights Act was adopted, in 1965, because traditional fourteenth and fifteenth amendment litigation had proven inadequate for the century-old task of guaranteeing the equal right to vote without regard to race. In place of the traditional litigation, Congress substituted a set of stringent remedies whose life has now been extended twice. The heart of these remedies is section 5, which Congress has described as "the front line defense against voting discrimination," S. Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975). *See also id.*, at 19; H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 11 (1975):

> "The Committee is convinced that it is largely section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise section 5 which serves to insure that that progress not be destroyed through new procedures and techniques."

This Court has repeatedly reaffirmed the broad sweep of section 5. *Allen v. State Board of Elections, supra; Perkins v. Matthews*, 400 U.S. 379 (1971); *Connor v. Waller*, 95 S.Ct. 2003 (1975). The latter two cases have addressed the specific issue involved in this case, namely, the extremely limited role of the federal district and circuit courts (except for the District Court for the District of Columbia designated in the Voting Rights Act itself) in passing upon questions that come within the sweep of section 5.

Amicus respectfully submits that this Court's cases, Congress' statements, and the recent history of voting dilution, all combine to dictate a holding in this case that the apportionment plans adopted by the East Carroll Parish Police Jury and School Board in 1968 and

thereafter "are not now and will not be effective as laws until and unless cleared pursuant to §5," and that the lower courts accordingly "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." *Connor v. Waller, supra,* 95 S.Ct. at 2003.

A.

Taking the simplest view of the matter, the record shows that two East Carroll Parish governmental bodies (Police Jury and School Board) covered by section 5 adopted reapportionment plans after November 1, 1964, which have never been cleared under the Voting Rights Act. Those facts, which are the elements of section 5 jurisdiction, should have barred the lower courts in this case from allowing the new plans to be implemented and should perforce have barred them from considering any fourteenth or fifteenth amendment questions.

This course was not followed, presumably, because of a mistaken belief that the pendency of reapportionment litigation in East Carroll Parish brought the plans within the "court decree" exception of *Connor v. Johnson,* 402 U.S. 690 (1971).[2] But that exception is limited to plans

[2]The original reapportionment suit, *Zimmer v. McKeithen,* involved only white plaintiffs and raised no fifteenth amendment issues. After the district court's initial determination that the existing apportionment was unconstitutional, there was never any adversity between the original parties: the plaintiffs consented to the defendants' adoption of the 1968 at-large plans and never took any further part in the lawsuit. This has been a frequent pattern in local redistricting, especially in Louisiana and Mississippi. In one case, involving Coahoma County, Mississippi, the plaintiffs and defendants were represented by two members of the same law firm.

If the court decree exception were extended to cover these cases, section 5 review would be precluded by judgments in which

[footnote continued]

actually devised or drawn by courts themselves, and does not extend to plans drawn by governmental bodies merely because those plans arise during litigation and are presented to courts which decline to hold them unconstitutional. *Johnson v. West,* C.A. No. 72-680 (D.S.C. June 14, 1972) (three-judge court). This distinction was made clear by this Court this year in the most recent chapter of the *Connor* litigation, *Connor v. Waller,* 95 S.Ct. 2003 (1975). There, after this Court and the district court had made it clear that the plan devised by the district court in 1971 should be modified at least by subdividing three named counties, the legislature did just that—it enacted the district court's plan as modified by the subdivision of the three counties. *See* 396 F.Supp. 1308 (S.D. Miss. 1975) (three-judge court). The district court proceeded to review the new plans on constitutional grounds, holding that they were still within the court decree exception to section 5. This Court summarily reversed, holding flatly that "the district court erred in holding that [the new plans] are not legislative enactments required to be submitted pursuant to section 5 of the Voting Rights Act of 1965." 95 S.Ct. at 2003.

The limited scope of the court decree exception was confirmed by Congress when it extended the Voting Rights Act earlier this year. In an extensive discussion of the subject, the Senate Report discussed the recent *Connor* case, and said it was consistent with the principle of "primary jurisdiction for section 5 review." The Report went on to describe the appropriate procedure for

no racial discrimination issues were ever considered. Moreover, it is arguable that decrees of this sort, where a court which has enjoined the existing apportionment then goes on to review the constitutionality of a governmental body's *substitute* apportionment plan—even where there may be no challenge to the substitute plan—violates the "case or controversy" requirement of Article III of the Constitution of the United States.

courts to follow in reapportionment cases in section 5 jurisdictions:

> "Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised." S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975).

In this case, the petitioners themselves emphasize that the plans at issue are of legislative, not judicial, origin, Petitioners' Brief, p. 14, a fact which would be plain from the record in any event. For this reason alone, the district court should have refrained from upholding, and the court of appeals was correct (though for the wrong reasons) in voiding, the reapportionment plans presented by the Police Jury and School Board in this case.

B.

Excluding section 5 jurisdiction was especially erroneous here because this case illustrates virtually all the problems that have led Congress and this Court to emphasize the importance of section 5. First of all, it involves reapportionment, which has come to be recognized as the principal threat against which section 5 must

guard (and which led Congress this year to extend that section's operation for seven years, in order to cover the redistricting that will follow the 1980 census, *see, e.g.*, H.R. Rep. No. 94-196, *supra*, at 10-11). Secondly, it involves at-large elections, which are widely known as the single most effective device for diluting minority votes, and which have spread through section 5 jurisdictions in epidemic proportions since the passage of the Voting Rights Act. *See Perkins v. Matthews*, 400 U.S. 379, 389-90 (1971); H.R. Rep. No. 94-196, *supra*, at 10, 19-20; U.S. Comm. on Civil Rights, *The Voting Rights Act: Ten Years After* 204-327 (1975). These circumstances are highlighted by the graphic context of this particular change. The background is as follows:

By long-standing law, parishes in Louisiana have traditionally elected their police juries and school boards by single-member districts. Because of this fact, black voters in East Carroll Parish were able to elect several of these officials from single-member districts in 1966 and 1967, despite a long history of virulent discrimination in voting. *See United States v. Manning*, 205 F. Supp. 172 (W.D. La. 1962). In 1968, Louisiana suddenly reversed its long history of reliance on single-member districts, and amended its statutes to allow parishes to shift to at-large elections for school board and police jury. This change was submitted to the Attorney General, who objected to it in a letter citing East Carroll Parish as an example of discriminatory at-large elections. Letter of September 10, 1969 from Assistant Attorney General Jerris Leonard to Louisiana Attorney General Jack P. F. Gremillion, reprinted in *LeBanc v. Rapides Parish Police Jury*, 351 F. Supp. 783, 788-89 (W.D. La. 1969).[3] Accordingly, at

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[3] With specific reference to East Carroll Parish, the Attorney General's objection stated:

[footnote continued]

the time the district court entered the order now on appeal (as well as its earlier 1968 order) there was no authority in state law for at-large elections of parish police juries or school boards.

As the petitioners point out, Louisiana officials sought to have the Attorney General reconsider his objection to the enabling legislation, arguing especially that the objection was unnecessary since any parish that changed to at-large elections in reliance upon the enabling legislation would have to submit its new plan separately. Petitioners' Brief, p. 6. Based on this representation, the

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An example of such dilution has taken place in East Carroll Parish. Our available statistics show that in that parish, the number of registered white voters exceeds the number of registered Negro voters. However, in several of the wards, including Wards 1 and 3, Negro voters out-number white voters. Prior to a recent reapportionment suit (Zimmer v. McKeithen, Civil Action No. 13927, W.D., La., December 2, 1968), all police jury and school board members were elected by the voters of their respective wards. According to our records, in 1966, a Negro candidate was elected to membership on the school board from ward 3. In 1967, two Negroes were elected to the police jury from wards 1 and 3.

On November 18, 1968, the East Carroll Parish Police Jury, in special session, adopted a resolution which provided that all new police jurors be elected at-large throughout the parish. This resolution was incorporated in the reapportionment order and extended thereby to include all new school board members. Since this decision, two Negro candidates for school board offices, one from ward 1 and the other from ward 3, have been defeated in at-large elections.

We further note that under the provisions of Act 561, any concentration of Negro voting power would be subject to dilution by the creation of special school board election districts, the boundaries of which need have no relation to existing or future ward boundaries.

Attorney General in 1972 withdrew his objection to the enabling legislation, expressly conditioned, however, on the understanding that no school board and police jury election changes under the state legislation would be implemented until and unless submitted and cleared pursuant to section 5. Letter of April 14, 1972 from Assistant Attorney General David L. Norman to John F. Ward, Jr. (petitioners' counsel).

In light of these circumstances, allowing East Carroll Parish officials to adopt plans calling for at-large police juries and school boards, in the face of section 5 determinations to the contrary, would have been a serious abuse of discretion even if the district court had had any discretion in this area. Accordingly, in deciding to proceed under the fourteenth and fifteenth amendments, the lower courts erroneously ignored the requirements of the Voting Rights Act.

CONCLUSION

Congress has gone to extraordinary lengths, as this Court has recognized, to make certain that the highly effective remedy provided in section 5 be extended over as broad a field as possible. The orders of the lower courts ignored this fact, and they did so in a case which, of all cases that could be imagined, calls for administration of Congress' remedy. The judgment below should therefore be vacated with instructions to remand the case to the district court for further proceedings in accordance with section 5. (As in *Connor v. Waller*, if

elections approach with no new plan cleared under section 5 of the Voting Rights Act, the district court has the discretion to impose its own plan, but that plan must be measured by the standards of this Court's cases, including *Chapman v. Meier*, 420 U.S. 1 (1975).)

Respectfully submitted,

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Epstein, McClain & Derfner
P.O. Box 608
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